IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
February 24, 2009 Session

# STATE OF TENNESSEE v. JOHN WAYNE BLAIR

**Appeal from the Circuit Court for Sevier County**
**No. 10923-III Rex Henry Ogle, Judge**

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**No. E2008-00073-CCA-R3-CD - Filed December 17, 2009**

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The Defendant, John Wayne Blair, was convicted by a Sevier County Criminal Court jury of first degree premeditated murder. At the capital sentencing hearing, the jury imposed a sentence of life without parole. In this appeal, the Defendant raises the following issues: (1) whether the trial court properly denied the motion to suppress evidence, (2) whether he is entitled to a new trial based upon the method used for selection of the venire, (3) whether the court erred in admitting unpleasant photographs from the victim's autopsy and whether the court erred in its instructions to the jury with respect to the photographs, (4) whether trial court erred in admitting testimony under the doctrine of curative admissibility, and (5) whether the trial court erred in admitting expert testimony about mitochondrial DNA evidence without first conducting a hearing to determine the reliability and trustworthiness of the evidence. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed**

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Edward C. Miller, District Public Defender, for the appellant, John Wayne Blair.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany, Assistant Attorney General; James B. Dunn, District Attorney General; and Steven R. Hawkins, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

The case relates to the death of the victim, Kelly Sellers. The victim's mother, Tammy Peterson, testified that in April 2005, she was married to Mark Casson and that she lived with Casson and the victim in the Wilhite community of Sevier County. She said that she and the victim met the Defendant at a store in the community where they often ate breakfast. She said that after about a year, the Defendant and the victim became friends and that the victim bought marijuana from the Defendant.

Ms. Peterson testified that she last saw the victim alive about 8:00 or 8:30 a.m. on April 22, 2005. She said that the victim was to be at Ms. Peterson's woodworking shop around 10:00 or 10:30 a.m. but that the victim called around that time and said she had a flat tire. She said the victim asked that she come get her but that she did not have time to get the victim. She told the victim to do laundry and wash dishes and to call her later. She said the victim called her about 1:30 p.m. and told her she was going to the store to get hamburgers with the Defendant. She said the victim reported that she planned to go to the Defendant's home afterwards and that the victim's father was supposed to bring the victim to the pub where Peterson worked at 5:00 p.m. She said that she did not hear from the victim and that when she called home, Mr. Casson reported the victim was not home when he arrived at 5:30 p.m. She said that she left work about 1:00 a.m. and that when she arrived home, the victim was not there.

Ms. Peterson testified that she and Mr. Casson went to the Defendant's home about 9:00 a.m. the next morning. She said the Defendant stated that he had taken the victim home the previous day at 4:30 p.m. She said that outside the Defendant's home, she smelled a strong bleach odor and noticed that a window of the home was open.

Ms. Peterson testified that she went to the store in the community and inquired about the victim. She said the owners told her that they had not seen the victim since the previous day. She said she notified the Sheriff's Department on the morning of April 23 that the victim was missing but that she was not allowed to make a missing persons report until that afternoon, after twenty-four hours had elapsed. She said that Officer Hodges came to her house and said he would go to the Defendant's house to investigate. She said that Hodges came back to her house and that five or ten minutes after he returned, she heard something on his radio about a fire. She said that she waited about ten minutes after Hodges left and went to the Defendant's home, where she found the Defendant, Hodges, and a fireman, Sam Hasson. She said that Hodges instructed her to leave and that she went to the store.

Ms. Peterson testified that the Defendant later came to the store and accused Mr. Casson and her of fire bombing his house. She said that she asked the Defendant why he was not looking for the victim if he were a good friend of hers and that he did not answer.

Ms. Peterson testified that she called family members who lived out of town, some of whom came to Sevier County to look for the victim. She said they looked for the victim through April 27, although they were told at some point not to search because the Defendant was in the mountains. She said that on the morning of April 27, she and her brothers found the victim's body partially buried underneath a fallen tree. She said that law enforcement officers came to the scene.

Ms. Peterson testified that the victim and Tommy Humphrey were friends and that the victim babysat Humphrey's children on occasion. She denied having encouraged Humphrey to have a relationship with the victim.

Ms. Peterson testified that the victim had endometriosis, which she said was painful. She said the victim had multiple surgeries for the condition, including a hysterectomy. She said that the victim was given Oxycodone and Demerol for pain and that the victim had difficulty discontinuing

pain medications after surgery in July 2004. She said she was unaware of the victim's obtaining narcotics from Humphrey or on English Mountain. She said she did not recall confronting Humphrey about giving pills to the victim, but she stated she may have told him in a non-confrontational manner not to give the victim any medication.

Ms. Peterson testified that in May 2005, she saw Humphrey in front of his house and told him where she had been when the victim's body was discovered. She said he made a statement about it being a pretty place. She said that when she asked him whether he had ever been there, he denied he had and said the Defendant told him it was the Defendant's favorite place and that Humphrey could close his eyes and see how pretty it was. She said she found this statement to be odd and reported it to a detective on May 27, which she said was "a couple of days" after the conversation.

Sergeant Michael Hodges, Jr., of the Sevier County Sheriff's Department testified that he went to Ms. Casson's[1] home on April 23, 2005, in response to a call about the victim's being missing. He said that after talking to the victim's parents and learning the Defendant was the last person with whom the victim was known to have been, he went to the Defendant's home a mile or two away. He said, however, that no one answered the door but that he was uncertain whether the Defendant was home because there were several cars present. He said that as he began to leave, Randi Fox came up the road and that he gave her his business card and told her that he wanted to speak to the Defendant about the last place the Defendant knew the victim to be.

Sergeant Hodges testified that he returned to Ms. Casson's house and that within seven or eight minutes of his arrival, he received a report of a fire at the Defendant's house. He said he returned to the Defendant's home, where he saw the Defendant, Ms. Fox, Captain Hasson of the English Mountain Fire Department, and an unidentified fireman. He said the fire was inside the home and was still smoking but that the flames had been extinguished. He said there was a burned area in the carpet of the master bedroom. He said there was no bed in the bedroom. He said he asked the Defendant about the victim's whereabouts and that the Defendant said, "There is no telling, she was crazy." He said the Defendant stated that he had taken the victim to her parents' house at four or five o'clock the previous day. He said the Defendant claimed to have seen the fire from the road while riding his bicycle, to have gone to the community store to call 9-1-1, and to have returned and extinguished the fire with a garden hose. He said the Defendant made repeated statements about needing to find Tommy Humphrey to use Humphrey's cell phone. He said that Captain Hasson took carpet samples from the Defendant's home, which Hodges collected from Hasson as evidence.

Sergeant Hodges testified that he left and looked for the victim or anyone who might have seen her on the mountain. He said that Mr. Humphrey's home was near the market and that no vehicle was there. He said that when he drove past Humphrey's home a second time about fifteen or twenty minutes later, he saw Humphrey outside and talked to him. He said Humphrey said he had been expecting the authorities. He said that Humphrey stated he had a loaded nine millimeter gun

[1] Sergeant Hodges is referring to Tammy Peterson, whose married name at the time of the offense was Casson.

in his back pocket and that he took the weapon from Humphrey. He said Humphrey stated that he would fill in the blanks for Hodges. Hodges said Humphrey agreed to come to the police station to give a recorded statement. He said Humphrey requested that his children be allowed to leave the area with Ms. Fox first.

Carol Anne Cooper testified that she worked at the community store and was on duty on a Saturday in April 2005, when the Defendant came to the store and asked her to call 9-1-1 because his house was on fire. She said that as she made the call, the Defendant talked with the owners. She said that the Defendant did not leave right away but that his home was near the store.

Ms. Cooper testified that the Defendant, Tommy Humphrey, a young boy named Louie, and teenaged boys whose last name was Lawson were often together at the store. She said Humphrey's reputation for truthfulness in the English Mountain community was poor.

Sam Hasson testified that he lived on English Mountain in a condominium complex that he managed and that he was the assistant fire chief of the English Mountain Fire Department. He said that he was contacted on April 23, 2005, to go to a fire at the Defendant's home. He said that when he arrived, he saw the Defendant talking to a Sheriff's deputy. He overheard discussion of a missing girl and the Defendant's stating that she would not be found in his home. He said that he found only remnants of a fire in the master bedroom of the Defendant's home and that there was no bed in the room. He said he overheard the Defendant tell the deputy that Tommy Humphrey was trying to burn him out. He said that the evidence at the scene did not support something having been thrown inside the home. He said that glass was broken both inside and outside the home and that if something had been thrown inside, he would expect the majority of the glass to be inside. He said there was no container that could have been thrown inside the home to start the fire. He said the burn pattern on the carpet was also inconsistent with a fire of this nature. He said he took a sample of the carpet. Mr. Hasson stated Dan Johnson was injured inside the Defendant's home. He said Johnson had a small, bleeding cut on his hand. He described the Defendant's home, the community store, the fire station, and Humphrey's home as all being close to each other.

Special Agent Robert Watson of the Tennessee Bureau of Investigation (T.B.I.) testified as an expert in arson investigation. He said he examined the Defendant's home on June 1, 2005. He said the fire had been contained to a bedroom and a bathroom doorway. He stated that a dog that was trained to detect accelerants signaled in the area where the bathroom adjoined the bedroom. He said the fire had burned in several non-connecting areas, indicating that it had been set intentionally. He said there was evidence of pour patterns where some type of accelerant had been poured. He said the evidence was not consistent with a fire bomb having been thrown through the window. He said that in his opinion, the fire was set intentionally to conceal a crime scene. He said later analysis revealed the accelerant to be "an evaporated gasoline range product."

Special Agent Laura Hodge of the Tennessee Bureau of Investigation testified as an expert in microanalysis. She said she analyzed two carpet samples and a linoleum sample submitted from the Defendant's home and determined that they contained an evaporated gasoline range product. She said that she is a member of the violent crime response team and that she did not go to the scene,

although she was unaware whether other members of the team may have been called to the scene by Sevier County authorities.

Investigator Jeff McCarter of the Sevier County Sheriff's Department testified that he and other officers executed a search warrant at the Defendant's home about 4:00 a.m. on April 23. He identified a diagram and photographs of the home. He said there was evidence of a fire, including burn patterns on the floor and smoke sediment on everything. He said there was glass under the windows and a piece of wood covering the broken window. He said he found a reddish stain that appeared to be blood in carpet padding underneath the bedroom carpet. He said they found cleaning products, including bleach, Mr. Clean, and a spray bottle marked "scent killer." He said they found some rubber overshoes with red stains and a bucket with a large red stain. He said no bed was in the bedroom.

Investigator McCarter testified that the Defendant was sitting in a chair in the living room during the search warrant execution. He said he asked the Defendant about some of the red stains and that the Defendant said at first that the victim had a nosebleed. He said that the Defendant claimed a few minutes later that the victim vomited blood and that the Defendant cleaned it up. He said that he asked the Defendant why a bed was not in the bedroom and that the Defendant stated that he slept on the couch.

Investigator McCarter testified that in the back of a red pickup truck outside the Defendant's house, the officers found a gas can, a red spot on the tailgate, and hairs imbedded in the creases of the bed liner. He collected a sample from the red spot and the hairs.

Investigator McCarter testified that he and other officers conducted a cursory search of the Raymond Hollow area, where there were many unimproved mountain roads. He said this area was near the Defendant's home. While there, he observed a burned mattress and box springs.

Investigator McCarter testified that he returned to this area on April 27. He said the victim's mother and other relatives were present and were near the area where the body had been discovered. He said that the body was buried seventy-one feet from an unimproved "four-wheel drive road" and that tire tracks and red stains were along the unimproved road. He said they made cast impressions of the tire tracks. He conceded that there were also tire tracks from ATV and search vehicles. He said they also collected some leaves containing red stains. He described the body as being about two inches below the surface and wrapped in a blue tarp. He said that using a terracing technique, the officers unearthed the body. He said they left it wrapped in the tarp other than leaving the victim's feet exposed as they had been and pulling it back at the top of the clavicle to identify the body by a tattoo. He said the body and the tarp were sealed inside a body bag and sent for an autopsy. He acknowledged that the local authorities did not ask the TBI to send technicians to collect the evidence but said the local authorities used their own crime scene response team to collect the evidence.

Investigator McCarter testified that two search teams were on English Mountain, one focused on finding the victim and the other focused on finding the Defendant. He said the search for the victim lasted several days and that on one day, Tommy Humphrey searched with them. He said a

search team found the Defendant on April 28 on the back side of the mountain in an area of unimproved roads and trails about seven or eight miles from the Wilhite community. He said that when officers arrived to the area where the Defendant was, the Defendant called out to them from the woods and then agreed to surrender if the officers would restrain their dogs. He said the Defendant had with him a camouflage jacket, a canteen containing water, a camouflage waist pouch and an olive drab green miliary pouch. He said the waist belt contained survival equipment, including waterproof matches, a bagel, a signal mirror, duct tape, toilet paper, sunscreen, a whistle, a snake bite kit, and a belt. He said the green military pouch contained energy snack bars. He said they also found a key which operated the truck at the Defendant's home from which they had recovered the red stains and hair.

Investigator McCarter testified that after the Defendant was advised of and waived his Miranda rights, he became angry and confrontational when asked about the victim's death. He said the Defendant told him several times to ask Tommy Humphrey about what happened to the victim. He said that when the Defendant was asked about his previous statement that he did not have a bed and was told that a burned bed had been found near his home, the Defendant said he threw his bed away in Raymond Hollow after it broke but denied burning it.

Investigator McCarter testified that after it was determined in the autopsy that duct tape had been used on the victim's body, he recalled having seen duct tape in the Defendant's home. He said that he obtained a search warrant and went to the Defendant's home and retrieved the duct tape. He said that while at the home, he also took a pillow and pillow case from the couch because the pillow case had a red stain. He said that the Defendant had been seated in a chair in the same room as the couch when the first search warrant was executed. He said the authorities also seized the Defendant's truck and made tire impressions for analysis.

Investigator McCarter testified that the officers also obtained a swab sample from the Defendant for DNA testing. They collected hairs from the Defendant for analysis, as well. He said they also collected a swab sample and hairs from Tommy Humphrey. He said the Bomb and Arson Squad searched the Defendant's home in June 2005. He also stated that he collected hairs from the Defendant's bathroom floor and sink, although he did not specify on which occasion this was done.

Investigator McCarter acknowledged on cross-examination that the Defendant's home was in better order when the first search warrant was executed, compared with when the second was executed. He also acknowledged that a sheriff's deputy had gone to the Defendant's home the night after the first search and had stolen property, for which the deputy was later convicted.

Investigator McCarter acknowledged on cross-examination that the authorities discovered in the investigation of the victim's homicide that Tommy Humphrey had a stolen four-wheeler. He stated that Humphrey surrendered the vehicle to the authorities and was not charged. He professed no knowledge of the sheriff's department paying for lodging for Humphrey during the course of the investigation.

Terry Peterson testified that he was the victim's uncle and Tammy Peterson's brother. He said that he was an experienced hunter and that he came to Sevier County from his home in

Mississippi to help look for the victim. He said that the night before the victim was found, he met a young man at a lodge who was familiar with the area and who gave him advice about where to look for the victim and offered his assistance. He said that he did not know this person at the time but that after seeing Tommy Humphrey, he knew that the person was not Humphrey. He said that on the day the victim was found, he and other relatives followed some mud grip tire tracks in the woods where the man from the lodge had suggested they look. He said that based upon his hunting experience, he knew that it was more difficult to drag a body uphill than downhill and that for this reason, they began looking in the bottoms near the tire tracks. He said they found a place where a fire had been set in a hole. They also saw scratch marks on the bank and fresh dirt, which was where they found the victim. He said that a member of the family notified law enforcement of the discovery.

Doctor Sandra Elkins, an expert witness in forensic pathology, testified that she performed the autopsy of the victim's body. She said that when she received the body, it was wrapped in a plastic tarp that was covered in mud, except that the legs were exposed. She said that the victim had extensive blood clotting between her legs and blood tracking down her legs. She also noted duct tape around the victim's wrists, which she removed and gave to Detective Cubberly. She said that the victim had lacerations and contusions inside her lips which were consistent with the teeth pressing against the inside surface of the mouth due to compression. The victim also had bruising on her lower left forearm and left hand. She said the victim had laceration and tearing of the skin around her right eye, abrasions on her right cheek, and a contusion on her right jaw. She said the victim had abrasions near her mouth and on her left cheek and jaw that were consistent with compression, which might include the victim's having been gagged.

Doctor Elkins testified that the victim had lacerations on the top of her head that were blunt force injuries "at the top of the range of the force . . . needed to cause a laceration or tearing." She said there had been a minimum of five blows to the victim's head. She identified photographs of the victim's perineal area, one of which was taken of the body as it was received and a second which depicted the area after it had been surgically removed from the body in order to show the victim's injuries that were not otherwise visible. She said that these were massive avulsive lacerations which she said were "the most severe type of laceration." She said the bruising went entirely through the vaginal wall and that these injuries would have resulted in severe bleeding. She said the victim also had contusions around the anal area. She characterized the injuries to both areas as being consistent with forceful insertion of a hard foreign object. She said she collected evidence for a rape kit from both areas. Doctor Elkins testified that she clipped and collected the victim's fingernails. She also collected hair strands from the victim's hands, torso, and perineum area.

Doctor Elkins testified that after microscopic examination of a portion of the victim's vaginal wall, she determined that the injuries to that area occurred at least twenty-four hours before the victim died. She said that she concluded after microscopic examination of the victim's brain that the head injuries were inflicted at least six hours before death. She said the victim died from multiple blunt force injuries to her head and genital area. She estimated the victim's time of death at two days before her examination, which was at 8:30 a.m. on April 28. She said that her estimate of the time of injuries in relation to the death was more precise than her estimate of the time since the death.

Detective Matthew Cubberley testified that he received several items of evidence in this case and submitted them for testing to the T.B.I. and Federal Bureau of Investigation (F.B.I.) laboratories. He said he received items of evidence from the defense investigator, which he said were not separately preserved to prevent contamination. He said one group of items he received from the defense investigator included a shovel without a handle, three articles of clothing, duct tape, rebar, and a tube of lipstick. He said he submitted these items to the crime laboratory. He said he received a second group of items from the defense investigator consisting of a golf club, a hammer, a homemade nail hammer, and some tape. He said that the crime laboratory removed hair and fiber from the submitted evidence, which he then sent to another laboratory for analysis. He said he collected from Dr. Elkins the fingernail clippings, hair, and duct tape removed from the victim's body during the autopsy, as well as the samples that were collected as part of the rape kit.

Detective Cubberley testified that a deputy stole items from the Defendant's home between the first and second searches. He said the crime was investigated and that the deputy was charged with and convicted of aggravated burglary and theft.

Detective Cubberley testified that during the investigation, he went with Detective McCarter to Tommy Humphrey's home. He said that they were allowed to look through Mr. Humphrey's home but that they did not collect any items as evidence. He said that when the authorities were searching for the victim, Mr. Humphrey led them on a four-wheeler through areas of the mountain that Humphrey and the Defendant frequented. He said that Humphrey took them to the general area where the victim's body was later discovered but "not necessarily that same route." He said he was aware that the four-wheeler Humphrey was riding was stolen and that Humphrey later surrendered it to the Sheriff's Department. He said he was unaware of the Sheriff's Department or the District Attorney's Office's providing payment for lodging for Humphrey. He acknowledged that the search warrants for the Defendant's home were based on information from Humphrey. He said that Humphrey was questioned about his whereabouts on the night the victim disappeared and that their investigation revealed that he was with Justin Lawson, Jeremy Lawson, and Sean Lawson on April 22 and 23. He said the officers collected buccal swab and hair samples from Humphrey, which were submitted for analysis.

Detective Cubberley testified that the victim's body was downhill from the nearby trail. He said there were no marks reflective of the body having been dragged down the hill. He acknowledged that the tarp in which the body had been wrapped had dirt on it but no tears or scars.

Special Agent Sandra Poltorak of the T.B.I. testified as an expert witness in forensic science microanalysis in the area of tire track identification. She said that she analyzed the cast of the tire tracks that had been previously identified as having been made from the tire tracks at the scene where the victim's body was found and the inked tire impressions made from the tires on the Defendant's truck. She said that they were consistent in size and tread design and that the tracks could have been made by the Defendant's truck tires. She conceded that she could not make a definitive identification.

Agent Poltorak testified that she was part of the T.B.I.'s Violent Crime Response Team. She said that the team was available to assist local law enforcement authorities but that to the best of her

knowledge, the team was not asked by the Sevier County authorities to assist in collecting evidence in the present case. She said that she was not able to use photographic evidence submitted by the Sevier County authorities because it did not contain a measuring scale, which she said would have been included if the photographic evidence had been collected by the T.B.I. team. She conceded that no tires other than the Defendant's were analyzed.

Special Agent Linda Littlejohn of the T.B.I. testified as an expert witness in microanalysis. She examined the duct tape from the victim's body, the Defendant's home, and the Defendant's waist pack. She said that neither of the rolls of tape was consistent with that removed from the victim's body. She said that she also removed hair and fibers from some clothing items and packaged them without analyzing them.

The parties stipulated that Special Agent David Hoover of the T.B.I. examined the duct tape collected from the victim's left wrist and the items the State received from the defense investigator. The stipulation also provided that Agent Hoover detected no latent fingerprints on any of the items.

Special Agent Michael Turpeville testified as an expert witness in serology. He examined various items of evidence, including blood standards drawn from the victim and the Defendant. He said that blood containing the victim's DNA was on one of the pieces of carpet padding removed from the Defendant's home. He said the probability of finding this sample at random exceeded the world population. He said that a second piece of carpet padding from the Defendant's home contained blood with DNA that was consistent with that of the victim, although the sample did not contain enough markers to be classified as a complete match. He said that an overshoe from the victim's home contained human blood with the victim's being the major contributor of DNA and that the Defendant could not be excluded as the minor contributor. He said that a sample taken from the tailgate of the Defendant's truck and several samples taken from the area where the victim's body was found all consisted of blood containing DNA that matched the victim's. He also recovered what he later determined was the blood containing DNA that matched that of the victim from a bucket from the Defendant's home.

Agent Turpeville testified that he examined the oral, vaginal, and anal swabs from the victim. He said that all were negative for the presence of semen. He stated that he examined the fingernail clippings from the victim's body and determined that they contained the victim's DNA profile. He said that a preliminary test of the fingernail clippings did not contain a Y chromosome, which would have been present with male DNA. He said that he found no blood on the items that had been previously identified as having been recovered by the defense investigator.

Agent Turpeville testified that he was part of the T.B.I. Violent Crime Response Team. He said that luminol is sometimes used to discover blood evidence when it appears that someone has tried to clean a crime scene. He said, however, that when visible stains are present, luminol is not used because it will dilute the substance.

Agent Turpeville testified that he was familiar with the process of placing paper bags over a victim's hands to preserve evidence. He said that he had only done this in cases in which there may have been a hand-to-hand struggle. He said that in a case in which the victim died from blood

loss, he would expect there to be more blood at the crime scene. He said, however, that blood stains and DNA would be destroyed by fire.

Katherine Igowsky testified as an expert witness in trace evidence analysis. She stated that she examined hair evidence submitted in the present case. She said that she could not identify a hair as definitively having come from a person, but she could determine whether or not a person could be excluded as the source. She said that one of the two hairs collected from the victim's right hand was consistent with a known sample of the victim's hair but the other was not. She said that she excluded the Defendant and Humphrey as the source of one of the hairs but that she was unable to test the second hair to the Defendant and Humphrey's samples because it was consumed in earlier testing. She said that two of the seven hairs collected from the exterior surface of the victim were consistent with the victim's hair, that the Defendant could be excluded as the contributor of two of the hairs, that Humphrey could be excluded as the contributor of six hairs, and that one of the hairs was not suitable for microscopic examination. She said that two hairs from another group of hairs from the exterior surface of the victim's body were consistent with the victim's hair but that the Defendant and Humphrey could be excluded as sources. She stated that a hair from the victim's left hand did not come from the victim but that the Defendant could not be excluded as its source. She said that three of seven hairs from the bed of the Defendant's truck were consistent with the victim, that one was not from the victim but the Defendant could not be excluded, that the victim could not be excluded as the source of one but the Defendant could, that neither the victim nor the Defendant could be excluded as the source of another, and that Humphrey could be excluded as the source of all of the hairs from the truck. She did not examine four hairs collected from the Defendant's bathroom.

Ms. Igowsky testified that the victim's hair had been dyed, as had several of the hairs from the truck. She said the length of new hair growth from the hairs from the truck and the victim's known sample were consistent. Ms. Igowsky testified that she examined hair found on clothing, the rebar, and other items. She said that of the thirteen hairs she examined, the victim could not be excluded as the source of eleven of them. She said she did not compare these samples to known samples from the Defendant and Humphrey.

On cross-examination, Ms. Igowsky acknowledged that if the victim rode in the Defendant's truck frequently, it would not be unusual to find her hair in it, although she said that hair should not be in the truck bed if the person were riding in the front. She also admitted that if the two were together frequently, their hair might be transferred to each other. She said that there was some animal hair and dirt mixed in with some of the samples. She admitted that the hair samples were collected from the Defendant in February 2006 after the crime occurred in April 2005 and that the passage of time would make the hairs of limited comparison value.

Ms. Igowsky testified that some of the hairs that were dyed also appeared to have a pink color on them. She said that she noted in a photograph that the hairs had been collected from a pink shirt and that she concluded, albeit without scientific analysis, that the dye from the shirt had transferred to the hairs.

Catherine Knutson testified as an expert witness in mitochondrial DNA (mtDNA). She analyzed evidence submitted by the Sevier County Sheriff's Department. She stated that nuclear DNA is unique to an individual because it is inherited from both parents, whereas mtDNA is not unique to an individual because it is inherited maternally, meaning that a person will have the same mtDNA as his or her mother and siblings. She said that unlike nuclear DNA testing, mtDNA testing is not used for exact identification. She said, however, that an exclusion through mtDNA testing was definitive. She said that mtDNA testing is used for hair samples because nuclear DNA usually cannot be obtained from hair. She said that she did not perform mtDNA testing on several of the items submitted, as was the usual practice at her facility, but that she tested the necessary items for a representative sampling.

Ms. Knutson testified to the following conclusions from the items tested. A hair from the victim's right hand and a hair from the victim's left hand both contained mtDNA that was consistent with the Defendant's mtDNA, inconclusive with that of Humphrey, and inconsistent with that of the victim. Three hairs from the exterior surface of the victim's body were consistent with the Defendant's mtDNA and inconsistent with that of the victim and Humphrey. One hair from the exterior surface of the victim's body contained insufficient mtDNA for testing and yielded no results, and another contained a mixture and yielded inconclusive results. Three hairs from the bed of the Defendant's truck were consistent with the victim's mtDNA and inconsistent with that of the Defendant and Humphrey. Three hairs from the bed of the Defendant's truck contained insufficient mtDNA for results. She tested six items of debris from the evidence collected at Humphrey's home by the defense investigator and concluded that two were inconsistent with the victim, the Defendant, and Humphrey; one was inconsistent with the victim, inconclusive as to the Defendant, and consistent with Humphrey; and three contained insufficient mtDNA to draw conclusions. The Defendant's mtDNA profile could be expected to occur no more frequently than 8.83 percent of the time in the Caucasian population.

The State recalled Tammy Peterson, who testified that when she went to the Defendant's home at 9:00 or 9:30 a.m. on April 24, she smelled bleach. She said the Defendant's truck had always previously had a camper top on the bed but did not on that day. She said that the clothing and lipstick that were among the items found by the defense investigator were not things the victim would have worn.

The State recalled Detective Cubberley, who testified that Sevier County had its own mobile crime unit. He said that the mobile crime unit responded to the scene where the victim's body was found. He acknowledged the Sevier County team does not have a fingerprint expert but said testing of this nature was done at the T.B.I. laboratory. He said that at the scene where the body was found, the crime unit took the tire impressions and looked for footprints. He said that at the Defendant's home, the crime unit did not dust for fingerprints or use luminol to search for blood evidence. He said that luminol would dilute any samples found and was not effective after a fire.

Peter Buck testified that he was formerly employed by the Sevier County Sheriff's Department as a jailer. He said that he spoke with the Defendant, who was then an inmate, on May 7, 2005. He said that the Defendant was concerned for his safety but that he reassured the Defendant he was safe because he was on suicide watch and under constant supervision. He said the Defendant

stated that Tommy Humphrey was the person who killed the victim and that Humphrey thought he was going to get away with it. According to Buck, the Defendant said that he and Humphrey were just going to lock up the victim to scare her, that he had seen Humphrey rape the victim, and that when he last saw the victim, she was alive. Buck said the Defendant also stated that the Defendant and Humphrey took the camper off the truck, that Humphrey left with the victim alive in the back of the truck, and that when Humphrey returned, he told the Defendant to wash out the back of the truck.

Darryl Stark testified that he was an inmate of the Sevier County Jail, where he met the Defendant. Stark said that he had been convicted of bank fraud, domestic violence, drug possession, destruction of motel property, and failure to appear, and that he had pending charges in West Virginia. He said that he made notes about his conversations with the Defendant, which he read to the jury.

Stark testified that the Defendant told him that on the Thursday before the victim's death, Humphrey and the victim were at the Defendant's home "doing mushrooms and hydrocodone pills" and that Humphrey tried to convince the victim to have sex with both men simultaneously. He said that he gave the victim seven hydrocodone pills to have sex with him, that Humphrey barged into the bedroom and asked if he was next, that the victim said she would not have sex with Humphrey because he had not paid her for the last time they had sex, and that Humphrey became angry and called the victim the "neighborhood whore." Stark stated that the Defendant related that Humphrey later calmed down and promised to pay the victim with pills and mushrooms the following day and that the victim dressed and walked home.

Stark testified that the Defendant told him that on the next day, the victim came to the Defendant's house around 3:00 p.m. and that the Defendant drove the victim to various locations to find drugs. He stated that the Defendant said the victim threatened to tell the police the Defendant had raped her the previous evening unless the Defendant took her where she wanted to go. He said that the Defendant claimed to have taken the victim to his home to give her some pills, that Humphrey was arriving just as they did, that the three of them went inside, that the Defendant told Humphrey what the victim had said, that Humphrey told the Defendant to leave for about half an hour, and that the Defendant drove around for thirty minutes. He said that the Defendant stated that when the Defendant returned, he found the victim and Humphrey in the bedroom having sex. He said the Defendant told him that Humphrey gave him a bag of mushrooms, which the Defendant ate before going into the bedroom, where both men had sex with the victim. He said the Defendant told him that Humphrey made the victim bend over and that Humphrey penetrated her with a flashlight before taking her into the bathroom and turning on the shower. He said the Defendant claimed to have dressed and watched television and that Humphrey opened the bedroom door later and told the Defendant to get something in which to wrap the victim. He said the Defendant told him that the Defendant went into the bathroom with a tarp, where the victim was lying on the floor, apparently asleep. He said the Defendant reported there was blood on the floor and that the Defendant and Humphrey wrapped the victim in the tarp. He said the Defendant told him that Humphrey dragged the victim into the bedroom, put the bed linens in a grocery bag, told the Defendant that they had to burn the evidence, and put some bags in the truck. The witness stated that the Defendant said he asked Humphrey whether the victim was dead, that Humphrey replied, "She should be," and that

Humphrey hit the victim in the head to ensure that she was dead. He said the Defendant told him that the two men loaded the victim into the back of the Defendant's truck, that the Defendant followed Humphrey's instructions and drove up the street, and that Humphrey followed on a four-wheeler.

Stark testified that the Defendant told him that the two men drove onto a trail, where Humphrey poured gasoline on the bags and burned them. He said the Defendant also stated that the men removed the victim's body from the truck and put her on the ground and that Humphrey dragged the body to a hole where a tree had fallen. He said the Defendant said that the Defendant had gone home and attempted to clean up the blood and "started freaking out."

Stark testified that the Defendant told him that Humphrey told the police the next day that the Defendant had admitted hitting the victim in the head until she fell into some weights and died. He said the Defendant also stated that Humphrey said the Defendant took the victim to the mountains and put her in the hole by the tree. He said that the Defendant stated that he "freaked out," went into the mountains, walked to Humphrey's house, and waited for Humphrey to come home, but left when Humphrey arrived with another person. He said the Defendant reported having gone back into the mountains and killed some wildlife for food.

On cross-examination, Stark acknowledged that he had pending marijuana charges in West Virginia. He acknowledged that he had not appeared in Ohio on bank fraud charges but stated that he had been unable to do so because he was incarcerated in Tennessee and that he served time in Ohio after completing his sentence in Tennessee. He acknowledged that he did not like being in the Sevier County Jail and had only been there for a short time before he began providing the jailers with information about the Defendant. He admitted that he had been involved in passing forged checks relative to the bank fraud charges in Ohio.

The State offered into evidence a letter that one of the prosecutors wrote to a prosecutor in West Virginia. In the letter, the Tennessee prosecutor stated that Darryl Stark had cooperated with the State in the Defendant's case.

The Defendant called Glen Almany, who testified that he has the public defender's investigator. He said that he went to Humphrey's former home on April 18, 2006, where he found a woman's shirt in the yard, a shovel without a handle in a ditch, some metal items near a burn pit, clothing near the burn pit, a mallet or hammer near the burn pit, and duct tape in a creek. He said he photographed red stains on a wall inside the home. He said that he gained access to the home from a real estate agent, who told him that the home had been vacant since Humphrey's departure. Mr. Almany testified that he went to the area where the victim's body was found. He said that there was a steep hill that was about seventy-five yards going down to the area and that it would be necessary to slide or hold onto brush to go up or down the hill.

On cross-examination, Mr. Almany acknowledged that he was not trained in evidence collection. He admitted that he had packaged some of the items he collected together.

The defense recalled Detective Matthew Cubberley, who testified that he received the evidence from Mr. Almany on June 6, 2006. He said the defense had not relinquished this evidence until the State filed a motion to obtain the evidence.

Paul Clevenger testified that he was employed with the water and sewer utility district that served English Mountain. He said that he knew who the Defendant and the victim were and that he knew they had been dating. He said that he was at the community store about 1:30 p.m. on April 22, 2005, when the Defendant purchased food. He said the Defendant stated that he was taking food to the victim and that she was not feeling well. He said that shortly before 3:30 p.m., he was on a road near the Defendant's house and saw the Defendant and the victim leaving the house in the Defendant's gray car. He said that later that afternoon, he saw Humphrey's blue truck at the Defendant's house, and that about an hour and a half later, he saw Humphrey's truck at the Stewart residence. He said that Humphrey's truck had a hard shell camper on it and that a boy was standing beside the truck. He stated that he knew Humphrey was always armed with a nine millimeter pistol.

Doctor Sarah Vaught testified as an expert in psychology and mental retardation. She said that she evaluated the Defendant in August and October 2006. She said that she concluded after interviewing and testing the Defendant that his IQ was in the range of fifty-six and sixty-four, placing him in the mildly mentally retarded category. She was aware that Doctor Engum placed the Defendant's IQ as seventy and attributed the discrepancy to her more comprehensive testing.

Doctor Vaught testified that she reviewed the Defendant's school records, which reflected that he did not complete the fourth grade and was tested in February 1966 at the approximate age of eleven and determined to have an IQ of seventy-six. She said that scores on the children's test were generally higher than the adult test. She said the Defendant's score would also be affected by his lack of education. She said that she also determined that the Defendant's brother and mother had IQs in the seventies and that this trait may be either genetic or from childhood injury. She said that the information she had was that the Defendant had suffered significant childhood physical abuse, which included blows to the head, accidental injuries, and substance abuse. She said that her information was that the Defendant could perform some of the tasks of daily living, such as walking, talking, bathing, grooming, and dressing himself. She said, however, that tasks such as social interaction, concentration, understanding legal requirements, and attending his finances were difficult for the Defendant. She said that her information was that Humphrey assisted the Defendant with the latter activities. She said that mildly mentally retarded persons had decision-making capacity around that of a fifth grader and that they were easily influenced, particularly by those they trusted or feared.

Doctor Vaught testified that she reviewed the records of Doctor Abraham Breitstein, who performed a disability evaluation of the Defendant in 2000. He placed the Defendant's IQ in the range of sixty-three to seventy. She said, "[Doctor Breitstein's] diagnostic impressions were to rule out schizoid affective disorder, make substance dependence and sustained remission, and he diagnosed him as borderline, which is the level right above mild [mental] retardation." She said that when "rule out" was included in a diagnosis, the diagnosis should be considered further. She said the term did not mean the doctor had ruled out that diagnosis.

Doctor Vaught testified that she also reviewed Doctor Eric Engum's records of his competency evaluation of the Defendant. In addition to determining that the Defendant had a full-scale IQ of seventy, Doctor Engum "diagnosed schizophrenia paranoid type, episodic with inner episode residual symptoms, prominent negative symptoms, hallucinate independence in early remission in a controlled environment[, c]annabis dependence without physiological dependence, . . . borderline intellectual function, . . . rule out . . . mental retardation, . . . rule out . . . [a] learning disorder . . . ."

Doctor Vaught testified that in addition to IQ score, adaptive behavior and onset before age eighteen are considered in determining whether a person is classified as mentally retarded. She acknowledged that the only IQ score for the Defendant before age eighteen was seventy-six. She said that from a clinical perspective, the difference between an IQ that is slightly above or below seventy was insignificant. She said that persons such as the Defendant are able to perform tasks with which they are familiar and that if the Defendant had grown up in a mountain setting, his survival skills in the woods would not be remarkable. She said that although she did not dispute Doctor Engum's determination that the Defendant understood right from wrong, the Defendant's ability to perceive the consequences of his actions was "greatly limited." She said that the Defendant functioned on the level of a fourteen-year-old in adaptive behavior but functioned on the level of a five- to seven-year-old in his ability to foresee the consequences of his choices. She said the Defendant's ability to form premeditation was on the level of a fifth grader. She acknowledged that if the Defendant hid in the woods for several days that might indicate he was aware of the consequences of his actions or that it might indicate he was frightened.

The jury found the Defendant guilty of premeditated first degree murder. After a sentencing hearing, the jury imposed a sentence of life without parole. This appeal followed.

## I

We consider first the Defendant's argument that the trial court erred in denying his motion to suppress the evidence obtained from the searches of his home and the buccal swab sampling of him. He argues first that the applications which supported both the April 24 and 29 search warrants were insufficient because they relied on an affidavit containing hearsay statements of Tommy Humphrey, who was not described as a citizen informant. He also argues that the warrants were invalid based upon record-keeping irregularities. Finally, he argues that the April 29 warrant was defective because of erroneous dates it contained. We address these arguments in turn.

### A. Sufficiency of Affidavit

We begin with the Defendant's argument that the affidavit supporting the application for the two search warrants was insufficient. The State contends that the trial court correctly determined that the affidavit established that Humphrey was a citizen informant and that the affidavit established probable cause for the warrants to be issued. The affidavit in question states in pertinent part:

> On this date April 23, 2005 Deputy Michael Hodges responded to 4027 Wilhite Road in Sevier County, TN in reference to a missing

person. The complainant, Tammy Casson stated that her daughter whom Casson identified as Kelly Estell Sellers age twenty-two was missing. Tammy Casson stated that her daughter called her place of business at approximately 1335 hours on April 22, 2005 and explained that she (Kelly Estelle Sellers) was at her residence at 4027 Wilhite Road and that she was waiting for John Wayne Blair (Alias) to come and pick her up. Tammy Casson stated to Deputy Michael Hodges that this was the very last time that Tammy Casson ever spoke with her daughter, Kelly Estelle Sellers. Deputy Michael Hodges responded to the residence of John Wayne Blair (Alias) located at 1423 Honeysuckle Lane Sevierville, TN 37876 in Sevier County, TN. Deputy Hodges arrived at approximately 1615 hours. Deputy Michael Hodges was unable to make contact with any person at the residence at 1423 Honeysuckle Lane Sevierville, TN 37876. Deputy Michael Hodges then went back to the complainant's residence Tammy Casson located at 4027 Wilhote Road Sevierville, TN 37876 in Sevier County, TN at 1630 hours. At approximately 1645 hours while Deputy Hodges was speaking with the complainant, Tammy Casson, the Sevier County Sheriff's Department received a call from the English Mountain Market located at 1529 Alpine Drive Sevierville, TN 37876 that the residence of John Wayne Blair (Alias) located at 1423 Honeysuckle Lane Sevierville, TN was on fire. Deputy Hodges then responded back to 1423 Honeysuckle Lane Sevierville, TN and arrived at approximately 1650 hours. Upon arrival Deputy Hodges made contact with the owner of the residence John Wayne Blair (Alias). At the time of this initial contact Deputy Hodges asked John Wayne Blair (Alias) if there was any person still inside his dwelling. Deputy Hodges stated that he could see smoke coming from the side window of the mobile home. Upon closer inspection Deputy Hodges found the fire to be contained to the master bedroom and master bathroom area of the mobile home. At that point Deputy Hodges stated that the window of the master bedroom was shattered and glass particles were seen all over the floor area. Deputy Hodges asked John Wayne Blair (Alias) who had shattered the window and was told by John Wayne Blair (Alias) that "it must have been whoever started this fire[."] John Wayne Blair (Alias) stated to Deputy Hodges that he had taken his water hose and put the fire out. The English Mountain Fire Department responded to the fire, entered the residence, and assessed the damage. A portion of the carpet and padding was removed by English Mountain Fire Department Captain Samuel Richard Hassen. That portion was placed in a gray plastic "Kroger" bag that was taken from inside the bedroom in the home of John Wayne Blair (Alias) by Captain Hassen and turned over to Deputy Hodges. Deputy Hodges was able to speak with John Wayne Blair (Alias) about the where abouts or location of Kelly Estelle

Sellers. John Wayne Blair (Alias) told Deputy Hodges that he had taken Kelly Estelle Sellers to her home located at 4027 Wilhite Road Sevierville, TN on April 22, 2005 between approximately 1630 and 1700 hours and then John Wayne Blair (Alias) told Deputy Hodges that was the last time he ever saw or talked to Kelly Estelle Sellers (Alias). [sic] Deputy Hodges said that John Wayne Blair (Alias) was wanting to leave to go look for a friend of his named Gary Thomas Humphrey. Deputy Hodges said that when he arrived at the fire scene located at 1423 Honeysuckle Lane in Sevierville, TN that a female identified as Rainey Anna Fox of 999 Ohara Drive Dandridge, TN 37725 was also there and that Rainey Anna Fox told Deputy Hodges that she had come to John Wayne Blair's (Alias) residence to find Gary Thomas Humphrey. Deputy Hodges said that when he left the fire that he went to look for Gary Thomas Humphrey and indeed did make contact with Mr. Humphrey at his residence located at 1546 Lin Creek Road Sevierville, TN 37876. Deputy Hodges said that Gary Thomas Humphrey told him that he could provide Deputy Hodges with information about Kelly Estelle Sellers after Deputy Hodges could provide arrangements to ensure the safety of he and his family. Gary Thomas Humphrey then drove his vehicle to the English Mountain Market located at 1529 Alpine Drive Sevierville, TN where Deputy Hodges picked him up and drove Mr. Humphrey to the Sevier County Sheriff's Department. Your affiant, Detective Matthew Cubberley and Deputy Michael Hodges interviewed Gary Thomas Humphrey concerning the disappearance of Kelly Estelle Sellers who stated the following: Gary Thomas Humphrey stated that on Saturday Apirl 23, 2005 he and John Wayne Blair (Alias) were eating lunch in Gary's truck which was parked at the residence of Gary Thomas Humphrey at 1546 Lin Creek Road Sevierville, TN 37876 and that John Wayne Blair (Alias) asked Humphrey if he could keep a secret. Humphrey said that he told John Wayne Blair (Alias) that "yes he could keep a secret[.] Then Humphrey said that John Wayne Blair (Alias) said "he meant a really big secret[."] Humphrey said he responded by saying that "a secret is a secret and no one is bigger than the other[."] At that point John Wayne Blair (Alias) told Gary Thomas Humphrey that he had to "knock her off[."] Gary Thomas Humphrey said that he asked John Wayne Blair (Alias) what happened and that John Wayne Blair (Alias) told him that "she came to me wanting pills" and that he (John Wayne Blair Alias) said "I don't have any pills[."] At that point John Wayne Blair (Alias) said that she threatened to narc out the whole mountain concerning all the illegal drug use. Then John Wayne Blair (Alias) told Gary Thomas Humphrey that he John Wayne Blair (Alias) "popped her in the side of the head and that she went down to the floor" and then he told Humphrey, "I just sat down[."] Gary Thomas Humphrey stated that

> he had called John Wayne Blair (Alias) between the hours of 2130 and 2200 on April 22, 2005 because they had planned to go out and party. But Humphrey said that when he called John Wayne Blair (Alias) that he told Humphrey that he had been sleeping and that he was tired and that they should plan on going out and partying tomorrow because he was going back to sleep. Gary Thomas Humphrey felt that the cancellation was odd in nature. As John Wayne Blair (Alias) continued to tell Gary Thomas Humphrey what had happened he mentioned the phone call. John Wayne Blair (Alias) told Gary Thomas Humphrey that when Humphrey called him, "about thirty minutes had gone by since I popped her[."] John Wayne Blair (Alias) told Gary Thomas Humphrey that after he hung up with him that he went to move her and that she started coming to and then that John Wayne Blair (Alias) told her, "I'm was [sic] sorry that I had to hit you, but you were freaking out[."] Then John Wayne Blair (Alias) told Gary Thomas Humphrey that "she said it's O.K. and then her eyes rolled back in her head and she convulsed and that was it[."] Gary Thomas Humphrey asked John Wayne Blair (Alias) what happened then, and John Wayne Blair (Alias) stated, "I put her in my red truck, drove out to the woods, found a tree that had been uprooted, put her in the hole and covered her up with the dirt that sat beside that hole[."] After stating that, John Wayne Blair (Alias) asked Gary Thomas Humphrey "how do you feel about that[."] Gary Thomas Humphrey responded by saying to John Wayne Blair (Alias), "well, that's how life is sometimes[."] John Wayne Bliar (Alias) then told Gary Thomas Humphrey "I feel better about this now that I got this off me[."]

(Emphasis added.)

A trial court's factual findings on a motion to suppress are conclusive on appeal unless the evidence preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996); State v. Jones, 802 S.W.2d 221, 223 (Tenn. Crim. App. 1990). Questions about the "credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Odom, 928 S.W.2d at 23. The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. State v. Hicks, 55 S.W.3d 515, 521 (Tenn. 2001). The application of the law to the facts as determined by the trial court is a question of law which is reviewed de novo on appeal. State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997).

In Tennessee, a finding of probable cause supporting issuance of a search warrant must be based upon evidence included in a written and sworn affidavit, which sets forth sufficient facts upon which a neutral and detached magistrate can find probable cause for issuing the warrant. T.C.A. §§ 40-6-103, -104; Tenn. R. Crim. P. 41(c); State v. Jacumin, 778 S.W.2d 430, 432 (Tenn. 1989); State v. Bryan, 769 S.W.2d 208, 210 (Tenn. 1989). The need for the magistrate's independent judgment

means that the affidavit must contain more than merely conclusory allegations by the affiant. "Recital of some of the underlying circumstances in the affidavit is essential if the magistrate is to perform his detached function and not serve merely as a rubber stamp for the police." United States v. Ventresca, 380 U.S. 102, 108-09 (1965).

In determining the validity of a search warrant, the reviewing court may consider only the information brought to the magistrate's attention. Jacumin, 778 S.W.2d at 432. The affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant. Id.; State v. Melson, 638 S.W.2d 342, 354 (Tenn. 1982). When relying on information from an informant, the affiant must be able to demonstrate that the informant has a basis of knowledge and that he is credible or the information is reliable. See Jacumin, 778 S.W.2d at 436 (adopting two-prong test of Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969)); State v. Lewis, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000). As a practical matter, when the affiant is an investigating officer, his or her reliability may be presumed by the magistrate, as may be the reliability of other investigating officers upon whom the affiant relies. See State v. Moon, 841 S.W.2d 336, 338 n.1 (Tenn. Crim. App. 1992); State v. Brown, 638 S.W.2d 436, 438 (Tenn. Crim. App. 1982). Thus, no special showing of reliability is necessary when the information comes from such an officer. Moon, 841 S.W.2d at 338 n.1.

In Jacumin, the supreme court warned against applying the two-pronged test hypertechnically. 778 S.W.2d at 436. It also approved, as it previously had in Bryan, the United States Supreme Court's statement in Illinois v. Gates relative to the duties of magistrates and reviewing courts regarding the determination of probable cause:

> The task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

Gates, 462 U.S. 213, 238-39 (1983).

A finding of probable cause made by an issuing magistrate is entitled to great deference. State v. Yeomans, 10 S.W.3d 293, 296 (Tenn. Crim. App. 1999) (citing Melson, 638 S.W.2d at 357). Therefore, the standard to be employed in reviewing the issuance of a search warrant is "whether, in light of all the evidence available, the magistrate had a substantial basis for finding probable cause." State v. Meeks, 876 S.W.2d 121, 124 (Tenn. Crim. App. 1993).

As a preliminary matter, we dismiss the Defendant's concern that the information from Humphrey was hearsay. An affidavit for a search warrant may contain hearsay. See Jacumin, 778 S.W.2d at 432; Melson, 638 S.W.2d at 354.

As for the question of the quality of the information itself, our supreme court has distinguished between information provided by a known citizen informant and that obtained from a criminal or professional informant. State v. Cauley, 863 S.W.2d 411, 417 (Tenn. 1993); State v. Melson, 638 S.W.2d 342, 354 (Tenn. 1982). In State v. Stevens, the supreme court explained the rationale for the distinction:

> Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of revenge against the subject. The nature of these persons and the information which they supply convey a certain impression of unreliability, and it is proper to demand that some evidence of their credibility and reliability be shown. . . . However, an ordinary citizen who reports a crime which has been committed in his presence, or that a crime is being or will be committed, stands on much different ground than a police informer. He is a witness to criminal activity who acts with an intent to aid the police in law enforcement because of his concern for society or for his own safety. He does not expect any gain or concession in exchange for his information. An informer of this type usually would not have more than one opportunity to supply information to the police, thereby precluding proof of his reliability by pointing to previous accurate information which he has supplied. . . .

989 S.W.2d 290 (Tenn. 1999) (quoting State v. Smith, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993)) (emphasis omitted).

Information supplied by a criminal informant must be analyzed under the Jacumin test, while the known citizen informant is presumed to be reliable. Cauley, 863 S.W.2d at 417. Citizen informants, whether they be victims or witnesses, have necessarily gained their information through first-hand experience. Melson, 638 S.W.2d at 354-56 (citations omitted). The criminal informant provides information in exchange for some consideration–whether it be monetary or the granting of some exemption or privilege–while the citizen informant acts in the interest of society or personal safety. State v. Smith, 867 S.W.2d 343, 347 (Tenn. Crim. App. 1993) (citing State v. Paszek, 184 N.W.2d 836, 842-43 (1971)). Nevertheless, "information about the citizen's status or his or her relationship to the events or persons involved" must still be present. State v. Luke, 995 S.W.2d 630, 637 (Tenn. Crim. App. 1998).

In the present case, Humphrey, an identified witness, voluntarily provided the authorities with information about the Defendant's statements to him detailing the Defendant's criminal activity. Although there is no indication in the affidavit that Humphrey was himself involved in criminal activity, there was evidence to the contrary at trial, including the Defendant's statements that Humphrey was involved in the crime. See State v. Henning, 975 S.W.2d 290, 297 (Tenn. 1998) (holding that appellate court reviewing suppression question may consider evidence before the court at time of pretrial ruling as well as evidence later adduced at trial). The affidavit reflects that the

Defendant identified Humphrey as a friend and that Humphrey provided the authorities with information he had gained by virtue of his friendship with the Defendant. The affidavit reflects that Humphrey sought police protection before revealing the information but not that he received any monetary compensation or any concession. However, there was evidence at trial that the State arranged for lodging at the State rate for Humphrey, and although the State did not pay for the lodging, the victim's mother did. We conclude that Humphrey's statements are questionable as those being entitled to analysis as a citizen informant.

We therefore apply the Jacumin two-prong test. The basis of Humphrey's knowledge was his friendship with the Defendant, by virtue of which the Defendant confided in Humphrey about his criminal activity. That the witness was credible and his information reliable was demonstrated by other evidence available to the authorities. For example, the affidavit recites that the Defendant told Deputy Hodges that he had been with the victim between 4:30 and 5:00 p.m. on the day she disappeared. The affidavit also recited that the victim's mother told Deputy Hodges that she last spoke to the victim at approximately 1:35 p.m. on the date the victim disappeared and that the victim reported that she was waiting for the Defendant to pick her up. The Defendant's statement to Humphrey was that he had been with the victim on the date of her disappearance and had killed her. The victim's injuries and the location of her body were also consistent with the statement Humphrey attributed to the Defendant. We conclude that the information was sufficient under both prongs of Jacumin to establish probable cause. The trial court did not err in denying the motion to suppress. The Defendant is not entitled to relief on this basis.

B. Record-Keeping Irregularities

The Defendant also argues that the search warrants were invalid because the magistrate did not make two identical copies of the original warrants and that the magistrate failed to keep an exact copy of the warrants in his official records. The State responds that any irregularities were insignificant and did not invalidate the warrants and that the magistrate did, in fact, keep a copy of the warrants.

At the time the search warrants were issued in April 2005, Tennessee Rule of Criminal Procedure 41(c) stated in pertinent part:

> The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by the magistrate as a part of his or her official records, and one of which shall be left with the person or persons on whom the search warrant is served. The magistrate shall endorse upon the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution; and the exact copy of the search warrant and the endorsement thereon shall be admissible evidence. Failure of the magistrate to make said original and two copies of the search warrant or failure to endorse thereon the date and time of issuance and the name of the officer to whom issued . . . shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure.

Tenn. R. Crim. P. 41(c) (2004).

With respect to the April 24 warrant, the record reflects that the original contains the signature "Jeff Rader," who is identified as "General Sessions Judge." The judge's copy contains the signature "Jeff D. Rader," who is identified as "General Sessions I." The information written in the blanks for the dates of the signature, the issuance date and time, and the executing officer's name contain the same information, although the handwriting appears to be slightly different on the two documents. The word "Judge" is circled below Judge Rader's name in one place on the original, but it is not circled in the same place on the judge's copy.

With respect to the April 29 warrant, the record reflects that on both the original and the judge's copy, the information written in the blanks for the issuance contains the same information except that "SCSD" follows the executing officer's name on the original but not the judge's copy. The handwriting in which the executing officer's name is written appears different on the two documents. On both documents, "A.M." is stricken, but on only the judge's copy, "P.M." is circled.

At the suppression hearing, Detective Cubberley testified that on the April 24 warrant, Judge Rader filled out all of the information with respect to the issuance on the original and the judge's copy. He said that with respect to the April 29 warrant, he wrote his name as the executing officer on the judge's copy and that the judge wrote his name on the original. The general sessions court clerk testified that when her office receives a judge's copy of a search warrant from the judges or their secretaries, the receipt is logged into a book, and the judge's copy is filed with its original in a locked cabinet that is in a vault. She said that Detective Cubberley would not be able to access a judge's copy of a warrant without one of the clerks assisting him. She also said that neither of the judges who issued the warrants in question had a key to the cabinet.

The Tennessee Supreme Court has addressed a search warrant affidavit that had handwritten alterations, and a space for the magistrate's name was left blank on the original but completed on the judge's copy. State v. Davis, 185 S.W.3d 338 (Tenn. 2006). The defendant in that case moved to suppress the evidence on the basis that the magistrate had not prepared exact copies. The court held that the affidavit was not part of the search warrant and therefore not subject to the exact copy requirement of Rule 41(c). The court noted alternatively, however, that even if the affidavit were subject to Rule 41(c), the differences in the two documents were insignificant and would not warrant suppression under the rule. Id. at 346-47.

In resolving the present case, we are guided by the supreme court's conclusion in Davis, albeit in dicta, that insignificant variances are not fatal under Rule 41(c). In the case at bar, like Davis, the officer presented the magistrate with multiple copies to complete and sign, rather than an original that was later copied. See id. at 346, n.13. The record reflects here that the judge and the officer completed the documents and that they provided the same necessary information. Although the author of this opinion took the view in a concurring opinion in Davis that strict adherence to the dictates of Rule 41(c) was proper, the supreme court pointed out that insignificant differences are not fatal. See State v. Timothy Wade Davis, No. E2003-02162-CCA-R3-CD, Knox County (Tenn. Crim. App. Oct. 25, 2004) (Tipton, J., concurring), aff'd, 185 S.W.3d 338, 346-47. As such, we hold

that the trial court properly denied the Defendant's motion to suppress on the basis that the copies and the original warrants contained insignificant variations.

We also reject the Defendant's argument that the fruits of the searches must be suppressed because the magistrate did not keep a copy of the warrants. The record reflects that the judges who signed the warrants had the court clerk keep their copies in a locked cabinet in the vault. There was no violation of Rule 41(c) in this respect.

C. Date Irregularities

The Defendant also argues that the April 29 warrant is defective because although the affidavit states that the affiant swore to it on April 24, it contains factual allegations occurring on April 27 and 28. The Defendant cites no authority for his brief argument and has not explained how he was prejudiced by this dating error. The warrant contains the correct date, April 29. This appears to be no more than an insignificant clerical error in the affidavit. The Defendant is not entitled to relief. See Collins v. State, 199 S.W.2d 96 (Tenn. 1947) (holding that clerical errors in warrant which do not prejudice defendant do not invalidate the warrant); State v. Barbara Faye Powell, No. W1999-01825-CCA-R3-CD, Gibson County (Tenn. Crim. App. May 11, 2000) (stating rule of Collins in context of Rule 41(c) challenge in which dates in affidavit and warrant conflicted).

**II**

The Defendant argues that he is entitled to a new trial because the procedures for selecting the venire did not conform with the relevant statutes because the clerk used an electronic selection method without this having been authorized by the judges of the district, rather than drawing the names from a locked box, and because the clerk failed to follow other portions of the relevant statute. The State responds that the Defendant waived any objection to the procedure used by failing to object before the jury was sworn. We agree with the State.

The relevant statutes for compiling the venire and jury selection are found in Tennessee Code Annotated sections 22-2-301 through -316 (1994 & Supp 2008) (amended effective January 1, 2009). Section 22-2-313 provides:

> In the absence of fraud, no irregularity with respect to the provisions of this part of the procedure thereunder shall affect the validity of any selection of any grand jury, or the validity of any verdict rendered by a trial jury unless such irregularity has been specially pointed out and exceptions taken before the jury is sworn.

In the present case, the Defendant did not object to the procedure for compiling the venire before the jury was sworn. This issue was first raised in the motion for new trial. The Defendant did not raise in his motion for new trial or in this appeal any allegation of fraud. In denying the motion with respect to this issue, the trial court noted:

> Counsel for the defense at the time this case was originally set, we had in our opinion and it was set in the term preceding the term that this case was tried and I know terms have been abolished by statute. . . . The first setting of this case, which was continued, the Court had instructed the Clerk to . . . "call in some additional people."
>
> And Mr. Miller, I believe is the one that argued that and very properly, Mr. Miller, and you were exactly right on that issue because the Court did not follow the statute as it had been interpreted and applied in the case involving Judge Hamilton over in a district that includes Columbia. And you were exactly right about that, Mr. Miller, and so the Court continued this case until an entirely new panel of jurors selected by computer was chosen and then they had the normal jury orientation session that is always done, but you were exactly right and the Court appreciates, honestly, the fact that you did bring that to our attention and corrected any problems that the judges may have had on that.

The record does not contain a transcript of the Defendant's initial objection or any written objection. We conclude from the record before us that the Defendant objected and that the trial court remedied the Defendant's concern. Thereafter, the Defendant made no objection to any alleged defects in the new proceedings for selecting the venire. Given the absence of such objection, we hold that the verdict is not invalid. See T.C.A. § 22-2-313; Rutherford v. State, 409 S.W.2d 535 (Tenn. 1966) (holding that violation of statutory procedure in selection of grand and petit jurors did not invalidate the verdict in the absence of fraud).

**III**

In related issues, the Defendant challenges the admission of two photographs from the victim's autopsy and the trial court's instructions regarding the photographs of the victim's body.

A. Admission of Photographs

The Defendant claims that the trial court erred in admitting two photographs of the victim's vaginal area, one of which was taken after a portion of the area was removed from the rest of the body during the autopsy. The Defendant notes that a juror became ill when the latter photograph was shown to the jury and cites this as evidence of the prejudicial effect of the admission of the photographs. The State responds that the trial court did not abuse its discretion in admitting this evidence. We agree with the State.

The admissibility of photographs is a matter committed to the sound discretion of the trial court and will not be overturned on appeal without a clear showing of abuse of that discretion. State v. Porterfield, 746 S.W.2d 441, 450 (Tenn. 1988). The leading case regarding the admissibility of photographs is State v. Banks, 564 S.W.2d 947 (Tenn. 1978), in which our supreme court held that the admissibility of photographs of murder victims is within the discretion of the trial court after

considering the relevance, probative value, and potential unfair prejudicial effect of such evidence. Generally, "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." Id. at 950-51. The probative value of the evidence must be weighed against any unfair prejudice the defendant will suffer in admitting the evidence, and only if the unfair prejudice substantially outweighs the probative value may the evidence be excluded. Id. at 951.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Tenn. R. Evid. 403. Prejudicial evidence is not excluded as a matter of law. State v. Carruthers, 35 S.W.3d 516, 577 (Tenn. 2000) (citing State v. Gentry, 881 S.W.2d 1, 6 (Tenn. Crim. App. 1993)). The court must still determine the relevance of the visual evidence and weigh its probative value against any undue prejudice. Id. The term "undue prejudice" has been defined as "'[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" Banks, 564 S.W.2d at 951 (quoting Fed. R. Evid. 403, Advisory Comm'n Notes).

In Banks, the supreme court gave trial courts guidance for determining the admissibility of relevant photographic evidence. A trial court should consider: the accuracy and clarity of the photograph and its value as evidence, whether the photograph depicts the body as it was found, the adequacy of testimonial evidence in relating the facts to the jury, and the need for the evidence to establish a prima facie case of guilt or to rebut the defendant's contentions. Id.

In the present case, the record reflects that the Defendant made a timely objection to the admission of these photographs. The court conducted a hearing, at which Doctor Elkins testified that Exhibit 69 depicted the victim's perineal area as a part of the victim's body. She said that Exhibit 70 depicted the perineal area after she had excised it from the body in order to show extensive bruising around the anal opening. She said the bruising was not visible before this portion of the body was removed. She said Exhibit 70 also depicted hemorrhaging of the vaginal area. She stated that the victim died from "multiple blunt force injuries, particularly to the head and vaginal areas," which had resulted in "brain and vaginal/anal rectal injuries, and severe extensive blood loss." She said that it was particularly difficult in the case of massive injuries to the perineal area to explain the injuries to the jury in words alone. She said that she did not think she would be able to communicate verbally the full extent of the severity of the victim's injuries. The trial court found that the photographs were probative of the issue of intent and that their probative value on this point substantially outweighed any unfair prejudicial effect on the Defendant.

The record also reflects that a juror became ill during Doctor Elkins' testimony and the exhibition of Exhibit 70. However, the record likewise reflects that the courtroom was hot and that the trial court made several references during the trial to the unpleasant temperature and malfunctioning air conditioning in the courtroom. The defense moved for a mistrial and asked the judge to take judicial notice of the fact that the juror's sickness was caused by the photographs. The court denied both the motion for judicial notice and for a mistrial, noting that there was no proof of

the reason the juror became ill and rejecting the defense claim that the remaining jurors would be prejudiced by the juror's having fallen ill.

The photographs in question are unpleasant and gruesome. The State's theory was that the victim received the perineal injuries, which caused significant damage and bleeding, and that she remained alive for a period of time before she was struck in the head, causing the brain injuries. The State's proof was that the victim died from a combination of the trauma from the injuries and blood loss. Upon review, we hold that the trial court did not abuse its discretion in admitting the photographs. They were relevant to show that the victim's murder was intentional and premeditated and to demonstrate the extent of the multiple injuries. See, e.g., State v. Faulkner, 154 S.W.3d 48, 69-70 (Tenn. 2005) (holding that admission of gruesome photographs depicting use of a weapon on an unarmed victim, repeated blows, and brutality of attack was not error, photographs were probative of premeditation and intent). Although the photographs are disturbing, the trial court was within its discretion in determining that the probative value of the photographs substantially outweighed any unfair prejudice. Cf. State v. Alley, 776 S.W.3d 506, 516 (Tenn. 1989) (holding that trial court did not abuse its discretion in case involving rape of victim with a tree limb and murder when court admitted six photographs of victim's body taken at the scene, which depicted victim's badly beaten face and a stick protruding from victim's vagina). The trial court likewise correctly determined that there was no proof that the juror who became ill did so due to having viewed the photographs. The Defendant is not entitled to relief.

B. Jury Instructions

The Defendant also complains of the instructions the trial court gave the jury following the introduction of Exhibits 69 and 70. He argues that the instruction compounded the error in admitting the photographs and that the judge failed to submit the instruction to the jury in writing. The State responds that the trial court cured any error in its initial instruction by giving a curative instruction after the defense objected. The State also argues that the Defendant waived appellate consideration of any failure to submit the instruction to the jury in writing because he did not object at trial or in the motion for new trial. On both points, we agree with the State.

The Defendant focuses his issue on the instruction having been given after Exhibits 69 and 70 were filed. The record reflects, however, that the instruction in question was not limited to those two exhibits. Several autopsy photographs were filed, after which the trial court instructed the jury:

> Ladies and gentlemen, before [Doctor Elkins testifies further], let me say this, that these photos at this time, until I instruct you otherwise, and I could later on, but as I reminded you earlier, there are at least two elements of every crime, and in this case, certainly the mental elements, intent, premeditation are factors for you to consider in your deliberations, and so you may consider these items, all of these photos, certainly, as it relates to the issue of intent and/or premeditation, and I've been advised by previous issues on the issues of cause of death.

> The fact that a photograph may not be pleasant cannot be considered by you as to whether – just because of the photographs, just because of the photographs, whether this defendant is guilty or not guilty. In other words, the nature of the photographs, themselves, should not cause you to be swayed, obviously, one way or another at this juncture, as to whether this defendant did these acts. Now, there may be later evidence that may or may not be helpful to you in determining that issue, okay? Thank you.

The Defendant then objected to the instruction on the basis that it told the jury the photographs could be considered as evidence of premeditation. The court then instructed the jury:

> Ladies and gentlemen, let me say this about photographs. First of all, any decision that you make in this or, in fact, any other case should not be based just on the content of them. In other words, just because it shows something uncomfortable, should not be used by you for the purpose of saying just because of that, then assuming other facts, okay? And then, at the end of the case, I will instruct you further and more completely on the law, but you may consider these photographs as it relates to any required element of the offense.

The Defendant did not object to the curative instruction. The next day, the court offered to give a further instruction regarding the photographs. One of the defense attorneys stated that he did not object to the instruction but did not waive the earlier defense objection. The court then instructed the jury:

> Ladies and gentlemen of the jury, I want to instruct you on a matter that we had talked about previously at the introduction on [sic] photographs yesterday. . . .
>
> Earlier, when I instructed you concerning the review of the photographs and any other evidence that you may be presented for consideration, I instructed you about how to possibly consider that evidence. In order to clarify any confusion, please disregard any prior instruction I have given you related to the photographs or any other evidence to which the content of the same may be difficult for you to view.
>
> I now instruct you that at times during the trial, I have and will continue to rule upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by such rulings, nor my instructions, nor any other remarks I have – I never mean to indicate to you any opinion as to the facts or as to what your verdict should be.

You are the exclusive judges of the facts in this case. Also, you are the exclusive judges of the law under the direction of the Court. You should apply the law to the facts in deciding this case, and you should consider all the evidence in light of your own observations and experiences in life. You can have no prejudice or sympathy or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

The Defendant did not object after this instruction was given. At the conclusion of the proof, the court gave the following pertinent instructions, both verbally and in writing:

**STATEMENTS AND RULINGS OF THE COURT AND STATEMENTS AND ARGUMENTS OF COUNSEL**

At times during the trial, I have ruled upon the admissibility of evidence. You must not concern yourself with these rulings. Neither by such rulings, these instructions nor any other remarks which I have made do I mean to indicate any opinion as to the facts or as to what your verdict should be.

Statements, arguments, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but they are not evidence. If any statements were made that you believe are not supported by the evidence, you should disregard them.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection, and you must assume that the answer would be of no value to you in your deliberations.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never heard it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

**JURY: JUDGES OF FACTS AND LAW**

You are the exclusive judges of the facts in this case. Also, you are the exclusive judges of the law under the direction of the court. You should apply the law to the facts in deciding this case.

> You should consider all of the evidence in the light of your own observations and experience in life.
>
> . . . .
>
> **NO SYMPATHY OR PREJUDICE BY JURY**
>
> You can have no prejudice or sympathy, or allow anything but the law and the evidence to have any influence upon your verdict. You must render your verdict with absolute fairness and impartiality as you think justice and truth dictate.

The Defendant did not object to these instructions at trial or in the motion for new trial. At no point during the proceedings in the trial court did the Defendant request that any instructions be submitted to the jury in writing, although the Court did submit the instructions given at the close of all proof in writing.

The Defendant argues that "[t]here is absolutely no basis in the law for the trial court to specifically instruct the jury to consider a photograph on the issue of intent and/or premeditation especially when the evidence was already graphic and unfairly prejudicial." In criminal cases, the trial court must give "a complete charge of the law applicable to the facts of the case and the defendant has a right to have every issue of fact raised by the evidence and material to his defense submitted to the jury upon proper instructions by the judge." State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975); see T.C.A. § 39-11-203(c), (d) (2006) (entitling a defendant to have the issue of the existence of a defense submitted to the jury when it is fairly raised by the proof). A jury instruction must be reviewed in its entirety and read as a whole rather than in isolation. State v. Leach, 148 S.W.3d 42, 58 (Tenn. 2004). "An instruction should be considered prejudicially erroneous only if the jury charge, when read as a whole, fails to fairly submit the legal issues or misleads the jury as to the applicable law." State v. Faulkner, 154 S.W.3d 48, 58 (Tenn. 2005) (citing State v. Vann, 976 S.W.2d 93, 101 (Tenn. 1998)).

We consider the instructions given in the present case in their totality. In that light, we conclude that the jury received proper instructions. After the Defendant objected to the initial instruction, the court gave a further limiting instruction cautioning the jury about improper use of the photographs. See State v. West, 844 S.W.2d 144, 150-51 (Tenn. 1992) ("There is no requirement limiting a trial court to the use of 'pattern instructions.'"); cf. State v. Robinson, 146 S.W.3d 469, 492 (Tenn. 2004) (holding that trial court did not abuse its discretion in admitting post-mortem photographs and noting that court gave a limiting instruction admonishing jury about improper use of the evidence). The next day, the court told the jury to disregard the previous instructions and gave a replacement instruction that was a combination of Tennessee Pattern Instructions–Criminal 1.06, 1.08, and 43.04. Those instructions were appropriately given at this juncture. The court then gave the pattern instructions to the jury again at the close of the trial, this time in both verbal and written form. There was no error when the instructions are viewed in their totality. Further, the Defendant's complaint that the instructions were not submitted to the jury in writing is not supported by the record. The Defendant is not entitled to relief.

## IV

The Defendant claims that the trial court erred in admitting the testimony of Detective Matthew Cubberley that he had investigated and corroborated Tommy Humphrey's alibi. The State argues that this evidence was properly admitted under the doctrine of curative admissibility. We agree with the Defendant that the admission of the evidence was error, but we hold the error was harmless in light of the overwhelming proof of the Defendant's guilt.

The Defendant's theory at trial was that Humphrey placed all the culpability for the crime on the Defendant and that the State had relied upon Humphrey's statements, even though the evidence revealed Humphrey bore the culpability in the crime. During the Defendant's cross-examination of Detective Cubberley, the witness was asked several questions about the Sheriff's Department's reliance on information from Humphrey, particularly the information that was included in the affidavits supporting the search warrants and the arrest warrant.

The evidence in the present case was introduced on the State's redirect examination of Detective Cubberley. It consisted of the following:

> Q. [The arrest warrant for the Defendant] was based in part on statements that were given to you by Tommy Humphrey?
>
> A. Yes, sir.
>
> Q. Now, those statements that he told you about, did he give you statements of what he knew of his own personal knowledge, or did he give you these statements of what this defendant had told him about?
>
> A. What this defendant had told him about.
>
> Q. Now, did the – well, subsequently, you heard, at least, that this defendant was claiming that Tommy Humphrey did it or was involved; is that right?
>
> A. That's correct.
>
> Q. And based on that, did you interrogate Tommy Humphrey, you and your department, as to where he was and what he had done and where he had been that night in question?
>
> A. Yes, sir, we did.
>
> Q. And did he cooperate with you and give you a statement?
>
> A. Yes, sir, he did.

Q. And did you check out – did he have an alibi for where he was supposed to be?

A. Yes, sir, he did.

Q. And did it check out?

A. Yes, sir, it did.

At this point, the Defendant objected to the State's use of hearsay proof. The trial court ruled that the Defendant's theory had opened the door to this line of questioning. On recross-examination, the Defendant asked Detective Cubberley to identify the persons with whom he corroborated Humphrey's alibi and the dates for which these witnesses could vouch for Humphrey's whereabouts. Detective Cubberley provided the names of the witnesses and the dates supplied to him by those witnesses.

"'Hearsay' is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Tenn. R. Evid. 801(c). Unless allowed by the Rules of Evidence or other law, hearsay evidence is inadmissible. Tenn. R. Evid. 802. In the present case, the State offered proof that the detective investigated Humphrey's alibi–obviously by talking to third parties who told him the same thing as Humphrey. This information was offered to prove the truth of the matter asserted–that Humphrey provided a truthful alibi and that Humphrey was not involved in the victim's murder. This was hearsay.

The State contends that despite its hearsay character, the evidence was admissible under the doctrine of curative admissibility.

> Most often employed in criminal cases where the "door" to a particular subject is opened by defense counsel on cross-examination, the doctrine of curative admissibility permits the State, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination.

State v. Land, 34 S.W.3d 516, 530 (Tenn. Crim. App. 2000). The rule's purpose is fairness, and its operation does not open the door to all otherwise inadmissible evidence. Id. at 531. Only the evidence that is required to cure any prejudice from the cross-examination is properly admitted. Id. at 531-32. The goal is to ensure that the jury is not misled, and the evidence should not be admitted if it will do more harm than good in accurately portraying the facts to the jury. Id. at 532. Review of admission of evidence under the doctrine of curative admissibility is for abuse of discretion. Id.

In the present case, the Defendant attempted to cast suspicion on Humphrey by suggesting through cross-examination that the authorities conducted a less-than-thorough investigation of Humphrey, who may have placed the blame for the offense on the Defendant in order to exculpate himself. The State asked the witness not only if he investigated the alibi information, it elicited

testimony that the information "checked out." The latter testimony was beyond that which the trial court might properly admit within its discretion and was more harmful than helpful. Neither Humphrey nor the individuals who corroborated his alibi were called as witnesses by the State, thereby implicating the Defendant's Sixth Amendment right to confront the witnesses against him. See id. at 532-33. The doctrine of curative admissibility should not have been used to allow otherwise inadmissible hearsay evidence where, as here, the State could have proven the same matters through non-hearsay means, were it so inclined. The evidence that the alibi "checked out" was erroneously admitted.

That said, the Defendant is not entitled to relief unless he can demonstrate that the error more probably than not affected the judgment. T.R.A.P. 36(b). We conclude that the error was harmless in view of the overwhelming evidence of the Defendant's guilt. The physical evidence that implicated the Defendant and the Defendant's own admissions to an inmate provided substantial and significant proof of the Defendant's guilt. We conclude, therefore, that the Defendant is not entitled to a new trial on this basis.

**V**

Last, we consider the Defendant's claim that the trial court erred in admitting mitochondrial DNA evidence. He complains both of the admission of the evidence itself and the court's failure to hold a pretrial hearing to determine the reliability of this evidence as a prerequisite to admission. The State argues that the court properly admitted the evidence without a pretrial reliability hearing. We agree with the State.

Rules 702 and 703 of the Tennessee Rules of Evidence address the admissibility of opinion testimony of expert witnesses. Rule 702 states in pertinent part: "If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise." Tennessee Rule of Evidence 703 requires the expert's opinion to be supported by trustworthy facts or data "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." The determining factor is "whether the witness's qualifications authorize him or her to give an informed opinion on the subject at issue." State v. Stevens, 78 S.W.3d 817, 834 (Tenn. 2002). Evidence constitutes "'scientific, technical, or other specialized knowledge,' if it concerns a matter that 'the average juror would not know, as a matter of course.'" State v. Murphy, 953 S.W.2d 200, 203 (Tenn. 1997) (quoting State v. Bolin, 922 S.W.2d 870, 874 (Tenn. 1996)). Questions regarding the admissibility, qualifications, relevancy, and competency of expert testimony are left to the discretion of the trial court. McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 263-64 (Tenn. 1997). A trial court's ruling on the admissibility of such evidence may be overturned on appeal only if the discretion is exercised arbitrarily or abused. Stevens, 78 S.W.3d at 832.

In McDaniel, our supreme court identified procedures for preliminary determination the reliability and trustworthiness of scientific evidence. See McDaniel, 955 S.W.2d 257. With respect to DNA evidence, however, our legislature has provided:

> (a) As used in this section, unless the context otherwise requires, "DNA analysis" means the process through which deoxyribonucleic acid (DNA) in a human biological specimen is analyzed and compared with DNA from another biological specimen for identification purposes.
>
> (b)(1) In any civil or criminal trial, hearing or proceeding, the results of DNA analysis, as defined in subsection (a), are admissible in evidence without antecedent expert testimony that DNA analysis provides a trustworthy and reliable method of identifying characteristics in an individual's genetic material upon a showing that the offered testimony meets the standards of admissibility set forth in the Tennessee Rules of Evidence.
>
> (2) Nothing in this section shall be construed as prohibiting any party in a civil or criminal trial from offering proof that DNA analysis does not provide a trustworthy and reliable method of identifying characteristics in an individual's genetic material, nor shall it prohibit a party from cross-examining the other party's expert as to the lack of trustworthiness and reliability of such analysis.
>
> (c) In any civil or criminal trial, hearing or proceeding, statistical population frequency evidence, based on genetic or blood test results, is admissible in evidence to demonstrate the fraction of the population that would have the same combination of genetic markers as was found in a specific biological specimen. For purposes of this subsection, "genetic marker" means the various blood types or DNA types that an individual may possess.

T.C.A. § 24-7-118. Despite this statute providing for the admission of DNA evidence, the Defendant argues that mitochondrial DNA evidence is different from nuclear DNA testing in that it is less exact and offers a "grave potential for unfair prejudice" because the trier of fact may confuse it with nuclear DNA testing. He argues that the statute does not apply to mitochondrial DNA testing because the statute pertains to DNA comparisons for "identification purposes," not purposes of exclusion.

In State v. Scott, 33 S.W.3d 746 (Tenn. 2000), our supreme court held that the requisites of McDaniel did not apply to mitochondrial DNA evidence, by virtue of this statute, then codified at Code section 24-7-117. As an intermediate appellate court, we are bound by the decisions of the state supreme court. See, e.g., Rudd v. State, 497 S.W.2d 746, 748 (Tenn. Crim. App. 1973). We hold, therefore, that the trial court did not err in admitting the evidence without first conducting a threshold hearing on the reliability and trustworthiness of mitochondrial DNA evidence.

We similarly conclude that the Defendant has failed to demonstrate that the evidence was erroneously admitted. The evidence in this case was admissible pursuant to statute. The court did

not abridge the Defendant's statutory prerogative to offer proof at trial about the reliability and trustworthiness of the evidence or to question the witness about the statistical underpinnings of the evidence. The record reflects that this evidence was adduced and that the Defendant cross-examined the witness extensively about the limits of mitochondrial DNA testing. The Defendant is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

_____

JOSEPH M. TIPTON, PRESIDING JUDGE